for Special Purposes of the Income Tax Acts;[5] *Commissioners of Inland Revenue* v. *Smith;*[11] *Corbett* v. *Commissioners of Inland Revenue*[12] and *Lord Sudeley & Others* v. *The Attorney-General.*[4] The right of a beneficiary claiming on a total intestacy is similar except that he takes under a statutory trust for sale and conversion. See the English Administration of Estates Act, 1925, section 33.

Just as Callan J. pointed out in *Hall's case*[8] at page 1026 that the applicability of these cases to the interpretation of the words "entitled to" and "beneficially interested" where they occur in section 146 of the Land Transfer Act is not weakened or affected by the circumstances that they are revenue cases so also the same is true in the interpretation of section 173(a) of the Land Code (Cap. 81). Appellants have merely shown that the lodging and continued existence of the caveat would be advantageous to them pending the civil suit. But they have failed to bring themselves within the meaning of section 173(a) of the Land Code (Cap. 81).

Although the learned judge was of the view that it would be expedient and preferable for the lands to be preserved pending the civil suit, he considered himself, with respect, quite rightly, bound to remove the caveat as appellants had established no interest until the administration had been completed and the residue ascertained. In *Barnardo's case*[5] Lord Atkinson made these observations at page 11 which seem to cover the situation in the present case: —

"The case of *Lord Sudeley* v. *Attorney-General* decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained."

So that appellants as residuary beneficiaries cannot possibly claim to have interest until the residue is ascertained. Whether there will be any residue must await the completion of the administration.

For reasons given, I would dismiss the appeal with costs. Deposit to respondent on account of taxed costs. Costs to be paid out of the estate.

Ong Hock Sim F.J. and **Seah J.** concurred.

Appeal dismissed.

Solicitors: *Yong & Co.; Ee & Lim.*

ONG AH MOY v. NGA AH FAN & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) September 6 and November 23, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 64 of 1977]

Probate and Administration — Originating summons — Application to transfer land to beneficiaries — Intervention by person claiming to be daughter — Disputed questions of fact — More convenient to try disputed questions of fact in action.

Practice and Procedure — Originating summons — Disputed questions of fact — More convenient for questions to be decided in action.

In this case an originating summons had been taken out for the transfer of the land belonging to the estate to the beneficiaries. The appellant sought to intervene and to be added as respondent on the contention that she was the lawful daughter of the deceased. The learned trial judge dismissed her application. She appealed to the Federal Court.

Held: there were disputed questions of fact to be resolved in this case and therefore the appellant should be allowed to commence an action, *inter alia* for the determination of her status.

FEDERAL COURT.

A. Ramanathan for the appellant.

V. Balendran for the respondents.

Chang Min Tat F.J.: This is an appeal from the dismissal with costs of an application to intervene in the administration of the Estate of Ng Chiew deceased and to be added as a respondent in the action. The respondents cited were the administratrix and the administrator of the said estate as well as the remaining beneficiaries.

The background is somewhat complex and it is perhaps necessary to refer to it in some detail. The subject matter was a piece of land held under E.M.R. 3962 for Lot No. 4775 in the Mukim and District of Kuala Kuantan. It devolved on Ng Chiew (the deceased) on the prior death of his wife, Soo Mooi, as the surviving husband and therefore the sole beneficiary. Actually Soo Mooi left another piece of land held under E.M.R. 3963 for Lot 4776 in the same Mukim and District. Both pieces of land were held to the extent of an undivided ½ share only. It would appear that the half share of one piece was exchanged for the half share of the other, so that effectively the assets consisted of the whole land under Lot 4775. It was the only asset.

By Originating Summons No. 57/1975, the administratrix and the administrator prayed for an order to transfer Lot 4775 to themselves and the other beneficiaries in equal shares. It is in respect of this application that the appellant sought to intervene and to be added as a respondent on the contention that she was a lawful daughter and a beneficiary, and therefore entitled to an equal share with the other children.

Soo Mooi died on October 9, 1961 at the age of 59 as disclosed in the certificate of death. Ng Chiew filed a petition for Letters of Administration, Petition No. 5 of 1962, as the lawful husband. In paragraph 2, he gave the names of the survivors:

(1) Ng Chiew, husband, aged 62 years.

(2) Nga Ah Fur (f), aged 20 years.

(3) Ng Tak @ Ng Siew Fan, son, aged 17 years.

(4) Eng Ah Moi (f) @ Ng Chook Lin, daughter, aged 15 years.

(5) Eng Moi (f) @ Ng Chook Fong, daughter, aged 12 years.

(6) Ng Chow Lin, son, aged 8 years.

(7) Eng Ah Wing, son, aged 3 years.

The petition for Letters of Administration in the Estate of Ng Chiew who died on October 5, 1965 is not included in the record, but from the endorsements on the issue document of title to the land, Ng Chiew had been registered as the legal personal representative of Soo Mooi. However there has been no order for the transmission to him as the sole beneficiary or to his estate so that the Originating Summons No. 57/75 must be premature. The land is now registered in the names of the administratrix and administrator as legal personal representatives. How it came to be done is unexplained. But the respondents, for the purpose of resisting the application, relied on the list of the next of kin affirmed by Ng Chiew in his petition for letters of administration in the estate of Soo Mooi. It was stressed, not without reason, that a man should know his own children and it was suggested that if he left out some one, that some one could not be his child. On the other hand, a man may well omit a child by reason of forgetfulness or even by design. Such an omission is therefore by itself not conclusive.

The appellant relied basically on the certificate of the registration of her birth. The informant, one "Ong Chiew", was the same person as the father named in the certificate. In other words this Ong Chiew recognised the child, who was named Ong Ah Moy, as his. The mother was named Chui Su. The birth was registered as having taken place on November 7, 1939. Fortunately for her, her father had impressed his thumb-print on the certificate. This thumb-print was found by the Registrar of Criminals, Malaysia and Singapore, to be identical to the undoubted thumb-print of Ng Chiew on his N.R.I.C. The conclusion is inevitable that this Ong Ah Moy is the daughter of Ong Chiew alias Ng Chiew and Chui Su. It is unchallengeable that her father was the deceased.

At this point, it will perhaps be convenient to note that the birth certificate subsequently issued gives the name of the mother as Cho Siw, transformed by some one from Chui Su.

The appellant also obtained an affidavit from one Wan Chong a quondam neighbour who testified to her birth and to the subsequent births of the administratrix and administrator whom he described as the younger sister and brother of the appellant. He did not know the name of the mother or the names of the other children, the latter for the reason that by the time they were born, he had moved out of the area.

It was not the contention of the appellant that Ng Chiew, the deceased, had more than one wife. The appellant argued that she was the eldest lawful daughter of the union of Ng Chiew and his wife. The respondents argued that their mother Soo Mooi and the person named in the certificate of birth by the deceased as the mother of his child, i.e. Chui Su later Cho Siw were two different persons. Their contention was that the appellant was illegitimate and therefore not entitled under the Distribution Ordinance 1958 to share in the intestate estate of the deceased. But surely it can be similarly argued against them that a man should be expected to know his own wife and child.

The difficulty in this case, as I see it, arose from the romanization of Chinese names, a matter always of some difficulty. The same Chinese character has different pronounciations in different dialects. Romanization therefore depends in the first place on the dialect used. Even in the same dialect, persons untrained in phonetics would possibly render the word in several forms. This can be seen in the names of the parties in this case. The transition of the deceased from Ong Chiew to Ng Chiew has already been noted, as well as that of the mother from Chui Su to Cho Siw. The administratrix herself has had her name transformed from Nga Ah Fur to Nga Ah Fan, and as far as the names of the other children are concerned, they have been variously given the surname Nga, Ng or Eng. The question posed in this case whether Chui Su or Cho Siw, the mother of Ong Ah Moi is the same person as Soo Mooi the mother of the respondents and the wife of the deceased cannot therefore be answered adversely merely by phonetics.

Mr. Balendran who appeared for the respondents in the High Court and before this Court, submitted in the first place that the children of Ng Chiew should bear the same surname Ng. This, I take it, refers to the surname Ong of the appellant as a disproof of her claim. But this submission signally ignores the fact that Ng Chiew was formerly known as Ong Chiw, and the other fact that the other children had the surname spelt as Eng. Next, he contended that the birth certificate of the appellant did not give the name of the mother. That is not true. It did give the name and the name was from the report of the deceased himself. But the question of identity still remained.

The learned trial judge resolved this question in this way. He thought there was no evidence to show that Chui Su and Soo Mooi (a word which he, in his grounds of decision spelt as "Sooi Moi" — and this is yet another example of the transformation or corruption of Chinese names in their romanised forms) were one and the same person. He bore in mind that Ng Chiew the deceased had failed to include in his petition for Letters of Administration in the Estate of Soo Mooi the name of the appellant as a next of kin, and he would not accept the appellant's explanation that perhaps the reason for that was because at that time she had already married. It was perhaps not explained to the learned judge that when a Chinese girl marries, she is regarded as having left the paternal home for the home of another. He also thought the failure of the appellant to protest this omission significant, and rejected the explanation which is not without foundation in law, that there was no

point in such a protest as she was in any event not entitled to any inheritance in the mother's estate. He would however charge the appellant with lack of foresight, expecting her to provide for the future when the father died. Another reason has to be quoted to show its insubstantiality: "it was strange why the respondents who were the legitimate issues of the said Ng Chiew and Sooi Moi (sic) would want to disown their own flesh and blood and had denied that the applicant had lived with them unless there was bad blood between them or between the applicant and her parents."

For myself, what I felt strange about and would welcome an explanation for, is not that the appellant could be the legitimate child in the circumstances so far disclosed but that the two youngest sons Ng Chow Lin and Eng Ah Wing particularly the latter, could be the children born to Soo Mooi. If as the extract of the registration of her death showed, she died in 1961 at the age of 59 leaving Ng Chow Lin and Eng Ah Wing at the date of her death aged 8 and 3, this must mean that Soo Mooi gave birth to them in 1953 and 1958 when she was aged 51 and 56 respectively.

Finally the learned judge rejected the affidavit of Wan Chong because the deponent did not know the name of the mother. It is perhaps unfair to the learned judge and unfortunate that this case involving Chinese habits should be set before him. His duties were in no way lightened by the fact that the legal advisers handling this case were of another ethnic origin. But it is the commonest thing among the Chinese to call each other by assumed relationships so that in the result they do not know each other's real name. I therefore do not think that the ignorance of the mother's name is sufficient ground by itself to reject his affidavit out of hand.

And in this connection, it will be appropriate here to note that Soo Mooi is a name without a surname. It means only Soo Girl or more elegantly Miss Soo. For a boy, the tag is "Chai" or "Chye." It is therefore not beyond the realms of impossibility or even improbability that the Chui Su in the Registration of Birth or Cho Siw in the Certificate of Birth became familiarised to Soo Mooi, and Chui Su may be Girl or Miss Su with the surname omitted. I rather wonder what the birth certificates of the respondents will reveal as to the spelling of the name of their mother or what the N.R.I.C. of the mother will show. There is on the record ground for believing that the truth can be discovered therein. The wife of Ng Chiew died on October 9, 1961; the grant for the land was issued in this name of Soo Mooi. It is necessary for the Letters of Administration to be applied for in the estate of Soo Mooi, but it does not necessarily follow that the name of the mother is certainly spelt as Soo Mooi in the birth certificates of the respondents. And if it is not so, that would be an explanation in favour of the appellant and a reason why the summary rejection of the appellant's application at this stage of the proceedings, is with respect, unsound. For myself I do not think that the affidavit evidence adduced hitherto and the rationalization therefrom justify the order made.

The appellant could have founded her claim on an action but quite understandably from a not unpraiseworthy desire to save costs, particularly having regard to the smallness of the estate, applied by Originating Summons, basically, to be added as a beneficiary. She possibly did not anticipate the opposition she met with, but having regard to it, it should have become obvious then that an Originating Summons was not a convenient medium to try disputed questions of fact, and that the proper order would be not to dismiss the application, but to stand it down and to make a further order for an action, *inter alia*, for a declaration of her status.

For the reasons set out, I would allow the appeal, set aside the order of the High Court and substitute for it an order that the Originating Summons be stayed and that the appellant commences an action as plaintiff, with the respondents as defendants. There will be a further order that if the action is not commenced within six weeks from the date hereof, the application to intervene will be dismissed with costs.

I now come to the question of the costs of the appeal and of the proceedings in the High Court. It is very obvious that if the normal order of costs to follow the event is made and there is nothing in the conduct of the appellant to deprive her of her costs, there will be hardly anything left over from this small estate for the respondents to resist the action to come. However, in all the circumstances of the case, I would order that the costs of this appeal and of the proceedings in the High Court should follow the action. The deposit by the appellant is to be returned to her.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *H.Y. Lee & Co.; Maxwell, Kenion, Cowdy & Jones.*

PANG BROTHERS MOTORS SDN. BHD. v. LEE AIK SENG

[A.C.J. (Abdul Razak J.) October 16, 1976]
[Kuala Trengganu — Civil Appeal No. 1 of 1976]

Hire Purchase — Instalments in arrears — Repossession of car — Notice — Whether there was sufficient compliance with s. 15(1) of Hire Purchase Act.

A car was taken by the respondent on hire purchase with appellant. On failure of the respondent to pay the instalments due under the said agreement, the appellant issued a notice under section 15(1) of the Hire Purchase Act. The respondent did not comply with the notice and the vehicle was repossessed. Consequently the respondent filed a writ against the appellant claiming that the repossession was illegal. The President, Sessions Court gave judgment in favour of the respondent and the appellant appealed.

Held, dismissing the appeal: (1) there was a doubt as to whether the notice was in fact served;

(2) section 15 clearly specifies that the period shall not be less than 21 days after the service of the notice before the seizure could take place. However, the date specified in the notice was 2 days short of the statutory minimum and the notice was therefore bad in law.